

1 THE HONORABLE ROBERT S. LASNIK
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10 IN THE UNITED STATES DISTRICT COURT
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WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

ROBERT TURNER,

Plaintiff,

vs.

NICHOLAS HOGAN, JOHN DOE, DAVID HAYNES, and CITY OF TUKWILA.,

Defendants.

No. 2:14-cv-00675 RSL

DEFENDANT HOGAN'S
OPPOSITION TO PLAINTIFF'S
MOTION TO AMEND
COMPLAINT

I. RESPONSE TO REQUESTED RELIEF

The court should deny Plaintiff's motion to amend because it violates the court's case schedule order and seeks to assert new claims (malicious prosecution, negligent hiring) which would raise new issues with no time remaining in the case schedule to address them. The malicious prosecution claim would also be futile because the existence of probable cause was determined in the underlying criminal prosecution. Plaintiff's proposed amended complaint also seeks to make extensive allegations about unrelated complaints and allegations of others for the improper purpose of trying to get the complaint admitted at trial. Plaintiff's motion fails to explain Plaintiff's failure to

DEFENDANT HOGAN'S OPPOSITION
TO PLAINTIFF'S MOTION TO AMEND
COMPLAINT - 1

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Turner Kugler Law, PLLC
4700 - 42nd Ave SW, Suite 540
Seattle, WA 98116
(206) 659-0679

1 comply with the court's case schedule order in seeking this amendment and fails to set
2 forth good cause to allow new claims to be asserted after the time for discovery has
3 expired.

4 **II. STATEMENT OF FACTS**

5 This matter arises out of an incident on April 16, 2011, when Officer Hogan and
6 other Tukwila police officers were dispatched to multiple 911 callers' reports of up to
7 twenty gunshots being fired in a residential neighborhood. Witnesses identified a
8 residence located at 13305 Macadam Rd. S., as the source of the gun fire. At that
9 location, police encountered a crowd having a party and consuming alcohol and/or
10 drugs. Many of the persons in the crowd were hostile to the officers.

11 Defendant Hogan ordered Plaintiff to stay back when another officer was
12 attempting to separate and detail an unruly individual who was instigating hostility toward
13 police. When Plaintiff failed to comply with Hogan's direction to stay back, Hogan
14 attempted to move him back but Plaintiff slapped his arm away and faced him in a
15 fighting stance. Hogan fell down during some pushing between the two and other
16 officers came to his aid. One officer (whom Plaintiff elected not to sue) used a Taser on
17 Plaintiff. Another officer (whom Plaintiff also did not sue) used pepper spray on Plaintiff.
18 Hogan cited Plaintiff for violating Tukwila Municipal Code 8.30.070 (Assault Against a
19 Police Officer) and Tukwila Municipal Code 8.60.020 (Obstructing a Public Servant,
20 adopting RCW 9A.76.020), both gross misdemeanors. Although these charges were
21 later dismissed, a judge made a determination that there was probable cause supporting
22 the charges.

23 Plaintiff claims he was complying with Hogan's directions, did not strike Hogan
24 and voluntarily got down on the ground after Hogan fell to the ground. He claims that
25 Hogan then stomped on his ankle and said "this one will never play basketball again."

DEFENDANT HOGAN'S OPPOSITION
TO PLAINTIFF'S MOTION TO AMEND
COMPLAINT - 2

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1 Defendant Hogan denies saying or doing any such thing. X-rays showed Plaintiff's ankle
2 injury was a twisting injury, not the result of blunt force trauma.

3 Plaintiff commenced this action on April 16, 2014 – three years after the incident.
4 In July 2014, the court entered a case schedule order which set a deadline for amending
5 pleadings of April 8, 2015. (Dkt. # 11) The order also ordered that discovery be
6 completed by June 7, 2015, ordered that discovery motions be noted for hearing by the
7 Friday before the discovery cut-off date, and ordered that dispositive motions be filed by
8 July 7, 2015. (*Id.*)

9 Defendants previously consented to Plaintiff's request for additional time for
10 discovery. The court extended the discovery cut-off date to July 12, 2015. (Dkt. #25)
11 The court's order directed that all other deadlines remain the same, including the July
12 7, 2015, deadline for filing dispositive motions.

13 Plaintiff did not seek to amend his complaint within the time permitted by the
14 court's order. Plaintiff's motion does not identify any reason why Plaintiff did not bring
15 a motion to add the proposed new claims by April 8, 2015, as ordered by the court.
16 Plaintiff's motion identifies no reason why Plaintiff could not have complied with the
17 court's order.

18 **III. LEGAL ARGUMENT AND AUTHORITY**

19 **1. Plaintiff's Request is Untimely and Violates the Court's Order.**

20 The court's case schedule order required that Plaintiff bring this motion no later
21 than April 8, 2015. The court's order gave Plaintiff ample opportunity to amend his
22 complaint. Plaintiff's motion should be denied because Plaintiff's request for amendment
23 is untimely and violates the court's order.



1 **2. No Good Cause to Permit Amendment at this Time.**

2 Where a party seeks to amend a pleading after a pretrial scheduling order's
3 deadline for amending the pleadings has expired, the liberal Rule 15(a) standard for
4 amendment does not apply; the moving party must satisfy the stringent "good cause"
5 standard under Fed. R. of Civ. P. 16. See *Johnson v. Mammoth Rec., Inc.*, 975 F.2d
6 604, 607–08 (9th Cir.1992) (once a district court files a pretrial scheduling order under
7 Federal Rule of Civil Procedure 16 establishing a timetable for amending pleadings, that
8 rule's standards control); *C.F. v. Capistrano Unified School Dist.*, 656 F.Supp.2d 1190
9 (C.D. Cal. 2009) (pursuant to Rule 16(b), a scheduling order "shall not be modified
10 except upon showing of good cause and by leave of the district judge"). Unlike Rule
11 15(a)'s relaxed amendment policy, which focuses on undue delay and prejudice to the
12 other party, Rule 16(b)'s "good cause" standard centers solely on the moving party's
13 diligence. *Johnson*, at 609.

14 As the extended discovery period is coming to a close, Plaintiff now seeks to add
15 two new claims: malicious prosecution and negligent hiring. The former would expand
16 the scope of Plaintiff's claims to include the prosecution which took place after the
17 subject incident. The later would expand the scope of plaintiff's claims to include the
18 circumstances of Hogan's hiring and pre-hiring events. However, if Plaintiff were
19 permitted to assert these new claims, there would be no time for new discovery as to
20 these events, no time to bring any discovery motions that might be needed and no time
21 to develop and bring dispositive motions that may be appropriate for these new claims.

22 Plaintiff has failed to show that his failure to comply with the court's deadline for
23 amending pleadings was the result of anything other than his own lack of diligence.
24 Plaintiff has known the facts relating to the charges since the April 16, 2011, because
25 he was a participant. The charges were dismissed more than three and a half years



1 ago. He chose not to include malicious prosecution or negligent hiring claims when he
2 commenced this action. The court's April 8, 2015, deadline afforded Plaintiff ample
3 opportunity to add these claims if their omission was an oversight. Plaintiff's motion
4 identifies no reason why Plaintiff could not have complied with the court's order and
5 sought this amendment by the court's deadline for amending pleadings. Plaintiff's motion
6 fails to set forth good cause exists rather than lack of diligence. Plaintiff's motion
7 should be denied for this reason as well.

8 **3. Futility of Amendment.**

9 In addition, Plaintiff's proposed malicious prosecution claim would be futile. "A
10 court properly exercises its discretion in denying leave to amend if the proposed
11 amendment would be futile." *In re DRAM Antitrust Litigation*, 546 F.3d 981, 990 (9th Cir.
12 2008); *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986).

13 Malicious prosecution actions are not favored in the law. *Hanson v. City of*
14 *Snohomish*, 852 P.2d 295, 298 (Wash. 1993). Absence of probable cause is an
15 essential element of a claim of malicious prosecution. *Freeman v. City of Santa Ana*,
16 68 F.3d 1180, 1189 (9th Cir. 1995); *Hanson*, 852 P.2d at 298 ("If probable cause is
17 established, the action fails, for probable cause is a complete defense to an action for
18 malicious prosecution.") See also *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L.
19 Ed. 2d 308 (1980) (Section 1983 plaintiff is subject to collateral estoppel effect on issues
20 previously decided in criminal proceeding).

21 Plaintiff's malicious prosecution claim would be futile because the court in the
22 underlying criminal prosecution determined the existence of probable cause adverse to
23 Plaintiff when Plaintiff was arraigned and imposed conditions on Plaintiff's release in
24 accordance with Washington Superior Court Criminal Rule 3.2. (The court docket from
25 the underlying criminal action is attached.) Plaintiff is barred from re-litigating this issue



1 in a subsequent civil rights lawsuit and this determination is fatal to the proffered
2 malicious prosecution claim. See *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th
3 Cir. 2004); *Haupt v. Dillard*, 17 F.3d 285, 289, (9th Cir. 1994); *Tompkins v. Spokane*
4 *Cnty.*, No. C07-0195, 2009 WL 269386 (E.D. Wash. Jan. 30, 2009) (collateral estoppel
5 barred unlawful arrest claim where probable cause necessarily determined by
6 Washington state judge even though claims were later dismissed); *Wakgira v. City of*
7 *Seattle*, No. C08-1108, 2009 WL 2406330 at 14 (W.D. Wash. 8/3/09) (applying
8 Washington law and holding that collateral estoppel barred re-litigation of probable
9 cause where state judge found probable cause at preliminary hearing).

10 **4. Need for Bifurcation.**

11 Plaintiff's proposed amended complaint also seeks to allege extensive facts about
12 Hogan and other persons' complaints about him, in evidentiary detail, for the stated
13 purpose "of telling a more complete story in the event Mr. Turner's complaint is admitted
14 at trial." (Dkt. 30, p. 2) This is an improper purpose. It is also contrary to Fed. R. Civ.
15 P. 8(a)'s requirement that a pleading contain "a short and plain statement of the claim
16 showing that the pleader is entitled to relief."

17 The proposed new allegations about Hogan and complaints of others have no
18 relation to the incident of April 16, 2011. With respect to the claims against Hogan, they
19 are hearsay upon hearsay and purported character evidence. It is apparent that
20 Plaintiff's purpose is to try to prove that Hogan violated Plaintiff's rights on April 16,
21 2011, by smearing his character with irrelevant and prejudicial allegations of unrelated
22 incidents. Such evidence should be inadmissible as to the claims against Hogan based
23 on the events of April 16, 2011, because it would be unfairly prejudicial to Officer Hogan
24 to have to defend himself from character attacks and complaints of others.



If Plaintiff were permitted to assert a new negligent hiring claim and to use such evidence in his claim against the City, it would likely be necessary to bifurcate the claims against Hogan and against the City to prevent undue prejudice to Hogan from these allegations of events unrelated to the incident with Plaintiff. Amendment should be denied for this reason as well.

IV. CONCLUSION

Plaintiff's motion to amend is untimely, violates the court's case schedule order, and is untimely due solely to plaintiff's lack of diligence. There is no reason why plaintiff could not have complied with the court's case schedule order. There is no just cause to excuse Plaintiff's failure to comply. Plaintiff's motion also seeks to add a malicious prosecution claim which would be futile. It also seeks to make extensive allegations about unrelated complaints and allegations of others for the improper purpose of trying to get the complaint admitted at trial as evidence. It would be unfair to the defendants to have the scope of issues expanded after discovery has concluded and to assert claims when it is too late for the defendants to have an opportunity to prepare and bring dispositive motions. Plaintiff's motion to amend should be denied.

Dated: June 22, 2015.

TURNER KUGLER LAW, PLLC

By: s/ John T. Kugler
John T. Kugler, WSBA # 19960
Attorney for Defendant Hogan

DEFENDANT HOGAN'S OPPOSITION
TO PLAINTIFF'S MOTION TO AMEND
COMPLAINT - 7



CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record.

s/ John T. Kugler
JOHN T. KUGLER, WSB #19960
Attorney for Defendant KCHA
TURNER KUGLER LAW, PLLC
4700 42nd Ave SW, Ste. 540
Seattle, WA 98116
Telephone: (206) 659-0679
E-mail: john@turnerkuglerlaw.com



 Summary	 DOL	 FTAs	 Orders	 Proceedings	 Relations	 Warrants
	Docket		FTAs	Orders	Proceedings	Participants

Docket Information for Case:

CR0058002 TKP CN

Court: TUKWILA MUNICIPAL (TKM)

Note: CL 11/11

Date Description

05/17/2011 Case Filed on 05/17/2011

05/17/2011 DEF 1 TURNER, ROBERT LEE Added as Participant

05/17/2011 OFF 1 HOGAN, NICHOLAS Added as Participant

05/17/2011 ARR YN Set for 06/06/2011 02:00 PM in Room 1 with Judge KAW

05/17/2011 LOCATION: 13305 MACADAM RD S TUKWILA @ 2115 HOURS

05/17/2011 FORMAL COMPLAINT AND WITNESS LIST FILED BY CITY ATY

05/20/2011 Notice Issued for ARR YN on 06/06/2011 02:00 PM

06/02/2011 PHONE CALL MADE BY VOLUNTEER- CONFIRMED COURTDATE WITH

06/02/2011 DEFT FOR 6/6 AT 2:00PM

06/06/2011 DEFENDANT FAILED TO APPEAR FOR ARRAIGNMENT

06/06/2011 DEFT NOT FOUND IN KING COUNTY JAIL

06/06/2011 PROBABLE CAUSE FOUND

06/06/2011 FILE TO JUDGE

06/06/2011 PER JUDGE WALDEN: DEFENDANT FAILED TO APPEAR- PC FOUND

06/06/2011 BENCH WARRANT \$2500 PENDING ADDRESS CERTIFICATE

06/06/2011 REQUEST FOR ADDRESS CERTIFICATE FORWARDED TO PROSECUTOR

06/06/2011 ARR YN: Not Held, Wt/FTA Ordered

06/07/2011 PHONE CALL FROM DEFTS WIFE, DEFT MISSED COURT YESTERDAY,

06/07/2011 WIFE ADVISED OF WAYS DEFT CAN QUASH HIS PENDING WARRANT

06/07/2011 PHONE CALL FROM DEFT - ADVISED OF POSSIBLE BENCH WARRANT

06/07/2011 FOR FAILURE TO APPEAR YESTERDAY AND PROCEDURE FOR

06/07/2011 PAYING TO \$100 CASH WARRANT FEE TO RESCHEDULE

06/07/2011 PHONE CALL FROM DEFT-HE DOES NOT HAVE \$100, DEFT ADVISED OF

06/07/2011 WARRANT WALK-IN CALENDAR

06/10/2011 REV ADCRT Set for 09/12/2011 03:15 PM in Room 1 with Judge KAW

06/13/2011 MOT BW Set for 06/13/2011 03:30 PM in Room 1 with Judge KAW

06/13/2011 ADDRESS/PHONE VERIFIED

06/13/2011 DEF SCREENED FOR PUBLIC DEFENDER - APPROVED; ORDER APPOINTING

06/13/2011 COUNSEL; DEF ADVISED TO REPORT TO COURTROOM FOR WARRANT

06/13/2011 WALK-IN CALENDAR

06/13/2011 ATY 1 KIRSHENBAUM, DAVID RICHARD Added as Participant

06/13/2011 JUDGE WALDEN PA WALLS

06/13/2011 2:55- DEFT PRESENT WITH COURTESY PUBLIC DEFENDER, ATY MURRAY

06/13/2011 WAIVE FORMAL READING

06/13/2011 ACKNOWLEDGEMENT OF ADVICE OF RIGHTS.

06/13/2011 PROBABLE CAUSE FOUND

06/13/2011 DEFENDANT SIGNED FOR AND GIVEN NOTICE OF COURT DATE

06/13/2011 DEFENDANT VERIFIED MAILING ADDRESS

06/13/2011 REV ADCRT on 09/12/2011 03:15 PM in Room 1 with Judge KAW Canceled

06/13/2011 PTR NN Set for 07/13/2011 10:30 AM in Room 1 with Judge KAW

06/13/2011 DEFENDANT REQUESTS JUDGE QUASH WARRANT

06/13/2011 MOTION GRANTED

06/13/2011 BENCH WARRANT FEE WAIVED

06/13/2011 Defendant Arraigned on Charge 1
 06/13/2011 Plea/Response of Not Guilty Entered on Charge 1
 06/13/2011 NAC : Notify court of address change
 06/13/2011 NVI : No Violations
 06/13/2011 Defendant Arraigned on Charge 2
 06/13/2011 Plea/Response of Not Guilty Entered on Charge 2
 06/13/2011 MOT BW: Held
 06/22/2011 ATY 1 KIRSCHENBAUM, DAVID RICHARD Removed
 06/22/2011 ATY 2 SU, CHUAN-YI PHILLIP Added as Participant
 06/22/2011 WITHDRAWAL OF COUNSEL AND NOTICE OF SUBSTITUTION FILED VIA
 06/22/2011 FAX BY ATTORNEY PHILLIP SU
 06/24/2011 CERTIFICATE OF ADDRESS SEARCH FILED BY PROSECUTOR
 06/24/2011 NEW ADDRESS FOUND; MATTER PREVIOUSLY RESUMMONED AND
 06/24/2011 HEARING HELD
 06/29/2011 PLAINTIFF'S RESPONSE TO REQUEST FOR DISCOVERY AND DEMAND
 06/29/2011 FOR DISCOVERY FILED BY CITY ATY
 07/07/2011 P/C TO DEFT TO REMIND OF COURT DATE - UNABLE TO LEAVE MESSAGE
 07/13/2011 JUDGE WALDEN PA WALLS
 07/13/2011 DEFENDANT PRESENT WITH COUNSEL, SU
 07/13/2011 MATTER RESET FOR PRETRIAL BY AGREEMENT
 07/13/2011 WAIVER SIGNED AND FILED THROUGH 10/11/11
 07/13/2011 DEFENDANT SIGNED FOR AND GIVEN NOTICE OF COURT DATE
07/13/2011 SAME CONDITIONS OF RELEASE APPLY
 07/13/2011 DEFENDANT VERIFIED ADDRESS
 07/13/2011 PTR NN Set for 08/08/2011 09:30 AM in Room 1 with Judge KAW
 07/13/2011 PTR NN: Held
 08/04/2011 PHONE CALL MADE BY VOLUNTEER- UNAVAILABLE, UNABLE TO
 08/04/2011 REMIND DEFT OF 8/8 COURTDATE
 08/08/2011 JUDGE WALDEN PA WALLS
 08/08/2011 10:31- DEFENDANT PRESENT WITH COUNSEL, SU
 08/08/2011 PRETRIAL ORDER FILED/SIGNED BY ALL PARTIES
 08/08/2011 MATTER CONFIRMED FOR MOTION STATUS/JURY TRIAL
 08/08/2011 SAME CONDITIONS OF RELEASE APPLY
 08/08/2011 DEFENDANT SIGNED FOR AND GIVEN NOTICE OF COURT DATE
 08/08/2011 DEFENDANT VERIFIED MAILING ADDRESS
 08/08/2011 MOT STAT Set for 09/28/2011 01:30 PM in Room 1 with Judge KAW
 08/08/2011 JTR Set for 10/06/2011 09:00 AM in Room 1 with Judge KAW
 08/08/2011 PTR NN: Held
 08/11/2011 Notice Issued for MOT STAT on 09/28/2011 01:30 PM
 08/11/2011 Notice Issued for JTR on 10/06/2011 09:00 AM
 08/17/2011 PLAINTIFF'S SUPPLEMENTAL RESPONSE TO REQUEST FOR DISCOVERY
 08/17/2011 AND DEMAND FOR DISCOVERY FILED BY CITY ATY
 09/08/2011 CITY'S STATUS SUBPOENA(S) ISSUED TO WITNESS(ES)
 09/08/2011 SUBPOENA(S) FORWARDED TO JUDGE WALDEN FOR SIGNATURE
 09/09/2011 SUBPOENA(S) PLACED IN U.S. MAIL
 09/22/2011 PHONE CALL MADE BY VOLUNTEER- CONFIRMED COURTDATE WITH
 09/22/2011 DEFT FOR 9/28 AT 1:30PM
 09/28/2011 PHONE CALL FROM DIVERSITY LAW GROUP- ATY SU IS RUNNING ABOUT

09/28/2011 45 MINUTES LATE, SCREEN PRINT TO COURTROOM TO ADVISE
09/28/2011 JUDGE WALDEN PA WALLS
09/28/2011 DEFENDANT PRESENT WITH COUNSEL, SU
09/28/2011 MATTER RESET FOR PRETRIAL BY AGREEMENT
09/28/2011 WAIVER SIGNED AND FILED THROUGH 12/27/11
09/28/2011 DEFENDANT SIGNED FOR AND GIVEN NOTICE OF COURT DATE
09/28/2011 SAME CONDITIONS OF RELEASE APPLY
09/28/2011 JTR on 10/06/2011 09:00 AM in Room 1 with Judge KAW Canceled
09/28/2011 PTR NN Set for 11/14/2011 09:30 AM in Room 1 with Judge KAW
09/28/2011 MOT STAT: Held
11/10/2011 PHONE CALL MADE BY VOLUNTEER- CONFIRMED COURTDATE WITH
11/10/2011 DEFT FOR 11/14 AT 9:30AM
11/14/2011 JUDGE WALDEN PA WALLS
11/14/2011 9:49- DEFENDANT PRESENT WITH COUNSEL TSIPRIN FOR ATTY SU
11/14/2011 CITY ATTY MOVES TO DISMISS WITH PREJUDICE
11/14/2011 NO OBJECTION BY THE DEFENSE
11/14/2011 CITY'S MOTION GRANTED
11/14/2011 CASE DISMISSED WITH PREJUDICE AND CLOSED
11/14/2011 Charge 1 Dismissed W/Prejudice : City's Mtn-Other
11/14/2011 Case Heard Before Judge WALDEN, KIMBERLY A
11/14/2011 Charge 2 Dismissed W/Prejudice : City's Mtn-Other
11/14/2011 Case Heard Before Judge WALDEN, KIMBERLY A
11/14/2011 Case Disposition of CL Entered
11/14/2011 PTR NN: Held
04/30/2013 CITY FINANCE DEPT AT FRONT COUNTER REQUESTING COPY OF DOCKET
05/09/2013 REQUEST FOR AUDIO FROM 9/28/11 AND 11/14/11 HEARINGS FILED
05/09/2013 BY CITY ATY VIA EMAIL
05/09/2013 9/28/11 HEARING WAS OFF THE RECORD- AUDIO NOT AVAILABLE,
05/09/2013 11/14/11 AUDIO HEARING PROVIDED PER REQUEST
05/23/2014 REQUEST FOR COPY OF FILE AND AUDIO FROM 11/14/11 FILED
05/23/2014 BY CITY ATY
06/30/2014 FILE REQUESTED FROM OFF-SITE STORAGE
07/17/2014 COMPLETE COPY OF FILE AND AUDIO OF 11/14/11 HEARING
07/17/2014 FORWARDED TO CITY ATY
07/25/2014 FILE RETURNED TO OFF-SITE STORAGE
